U. S. Department of Justice

Office of the Solicitor General

Principal Deputy Solicitor General

Washington, D.C. 20530

October 4, 2002

VIA FACSIMILE

Ms. Patricia S. Connor
Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Rumsfeld v. Hamdi, No. 02-7338

Dear Ms. Connor:

In connection with the above-referenced appeal, and pursuant to the Court's September 12, 2002, Order in this case, attached for filing is a copy of the Brief for Respondents-Appellants. A copy of this brief also is being served by facsimile on counsel for petitioners-appellees.

As we have discussed with Lisa Jernigan, Deputy Clerk, and counsel for petitioners-appellees, printed copies of the Brief for Respondents-Appellants and the Joint Appendix will be mailed today for express delivery on Monday to both the Court and opposing counsel.

Thank you for your assistance in this matter.

Very truly yours,

Paul D. Clement

Paul D. Clement
Principal Deputy Solicitor General

Enclosure

cc: Frank W. Dunham, Jr.

No. 02-7338

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI, et al.,

Petitioners-Appellees,

v.

DONALD RUMSFELD, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR RESPONDENTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page(s)

Constitution, treaties, and statutes:

Miscellaneous:

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JURISDICTIONAL STATEMENT

Petitioners invoked the jurisdiction of the district court under 28 U.S.C. 2241. On August 16, 2002, the district court entered an order (J.A. 425-439)[1] holding that the government's return and supporting declaration (J.A. 34-62) are insufficient to

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[1] The principal record materials referred to in this brief are included in the Joint Appendix. The first time such materials are discussed in the text, we refer to the place in the appendix where the materials may be found.

warrant dismissal of the habeas petition in this case, and requiring respondents to produce sensitive national-security materials concerning the detainee at issue for the court's ex parte, in camera review. On August 21, 2002, the district court certified for appeal under 28 U.S.C. 1292(b) the first question quoted below. J.A. 464. On September 12, 2002, this Court granted respondents' petition to appeal the district court's August 16 Order, and directed the parties "to address the question as certified by the district court, as well as any other issues fairly included within the certified order." Order at 2. This Court has jurisdiction under 28 U.S.C. 1292(b).

STATEMENT OF THE ISSUES PRESENTED

1. The district court certified the following issue for appeal:

> Whether the Mobbs declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

2. Whether the district court properly concluded that the government's return and supporting declaration are insufficient to establish the legality of Hamdi's detention as a captured enemy combatant.

3. Whether the district court properly ordered respondents to produce, for ex parte, in camera review, the additional materials concerning Hamdi, including raw notes and statements derived from intelligence-gathering interviews.

STATEMENT OF THE CASE

This case, with which this Court already is familiar, challenges the exercise of the Executive's core war powers at a time when the Nation is engaged in armed conflict abroad and seeking to defend the homeland from additional attack by an unprincipled and unconventional enemy. Yaser Esam Hamdi, the detainee at issue in this case, was captured by allied forces in Afghanistan, after he surrendered with a Taliban unit while armed with an AK-47 assault rifle. The United States military has determined that Hamdi should be detained as an enemy combatant in accordance with the well-settled laws and customs of war.

Petitioners admit that Hamdi was in Afghanistan – a zone of active military operations – when he was captured, and do not challenge the military's decision to detain him in Afghanistan. Pet. ¶ 9; Pet. Traverse at 2. But they claim that Hamdi's current detention violates the Fifth and Fourteenth Amendments to the Constitution, and seek his release. Pet. ¶¶ 22-23. Before the respondents had an opportunity to respond to that claim on the merits, the district court ordered that the public defender be granted private, unmonitored access to Hamdi. This Court reversed that order and remanded for additional proceedings. Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002). In doing so, the Court stated that "[i]t has long been settled that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the

government's present detention of him is a lawful one." Id. at 283.

On remand, the government filed its return and moved to dismiss the petition on the ground that Hamdi is indeed such an enemy combatant. In support of its return, the government submitted the sworn declaration (J.A. 61-62) of a Department of Defense official explaining the circumstances underlying the military's enemy-combatant determination. On August 16, 2002, the district court issued an order finding the government's submission insufficient to justify Hamdi's detention, and requiring production of additional materials, including copies of statements and raw notes from intelligence interviews of Hamdi conducted by the military. The district court's August 16 Order disregards the cardinal principles of separation-of-powers recognized by this Court's prior decision in this case, and should be reversed.

A. Factual Background

On September 11, 2001, the al Qaeda terrorist network launched a vicious, coordinated attack on the United States, killing approximately 3,000 persons. Immediately after the attack, the President, acting as Commander in Chief, took steps to prevent additional threats. Congress then backed the President's use of force against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Auth. for Use of Military Force, Pub. L. No. 107-40, 115

Stat. 224 (2001). Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected that network. In the course of that extensive campaign – which remains ongoing – United States and coalition forces, including the Northern Alliance, have captured or taken control of thousands of individuals. Just as in virtually every other major armed conflict in the Nation's history, the military has determined that many of those captured in Afghanistan should be detained during the war as enemy combatants. See Decl. of M. Mobbs. ¶ 1. Such detention serves the vital objective of preventing combatants from continuing to aid our enemies. In addition, it facilitates the gathering of intelligence to further the overall war effort, and, in particular, to aid military operations and prevent additional attacks on the United States or its allies. See Decl. of D. Woolfolk at 1-2 (J.A. 145-147).

The detainee in this case, Yaser Esam Hamdi, appears to be a Saudi national who, records indicate, was born in Louisiana. He went to Afghanistan before September 11, 2001, and stayed there after the United States and coalition forces

began military operations in that country last fall. In late 2001, while Northern Alliance forces were engaged in battle with the Taliban near Konduz, Afghanistan, Hamdi surrendered – while armed – along with his Taliban unit, and was taken to a prison maintained by the Northern Alliance in Mazar-e-Sharif. Mobbs Decl. ¶¶ 3-4. Hamdi was subsequently transferred to a Northern Alliance prison in Sheberghan, where he was interviewed by a U.S. Interrogation Team. Id. ¶ 5.

Based on interviews with Hamdi and his association with the Taliban, the United States military determined that Hamdi is an enemy combatant. Mobbs Decl. ¶ 6. In Afghanistan, Hamdi told United States military authorities that he went to Afghanistan to train with and, if necessary, fight for the Taliban. Id. ¶ 5. Subsequent interviews with Hamdi likewise confirm his status as an enemy combatant. Indeed, Hamdi himself has stated that he surrendered to Northern Alliance forces and turned over his Kalishnikov (i.e., AK-47) assault rifle to them. Id. ¶ 9.

In addition, United States military authorities concluded that Hamdi met the criteria established by the Department of Defense for determining which of the captured combatants in Afghanistan should be placed under United States military control. Mobbs Decl. ¶ 7.[2] Pursuant to an order of the U.S. Land Forces Commander

[2] The screening criteria themselves are classified. As explained below (pp. 39-40, infra), although respondents do not believe that review of those criteria is necessary to the resolution of this case, respondents offered to file, ex parte and under

in Afghanistan, Hamdi was transferred from Sheberghan to a U.S. detention facility in Kandahar. Id. ¶ 7. Following a separate military screening in January 2002, Hamdi was transferred from Kandahar to the Naval Base at Guantanamo Bay, Cuba. Id. ¶ 8. In April 2002, after military authorities learned of records indicating that Hamdi was born in Louisiana, Hamdi was transferred to the Norfolk Naval Brig.

B. Procedural History

In June 2002, the detainee's father, Esam Fouad Hamdi, filed this habeas action on behalf of his son as his "next friend." Pet. ¶ 1.[3] The petition (J.A. 8-29) acknowledges that Yaser Hamdi was residing in Afghanistan when he was taken into control of the United States military. Id. ¶ 9. But the petition alleges that, "[a]s an American citizen, [Hamdi] enjoys the full protections of the Constitution," and that Hamdi's detention without charges or counsel "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." Id. ¶¶ 22, 23. That claim, petitioners stress, does not "implicate Respondents' initial detention of [Hamdi] in Afghanistan," but instead challenges "only" his detention in Norfolk. Pet. Traverse

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seal, additional information concerning the criteria with the district court. The district court refused that offer, Tr. of Aug. 20, 2002 Hrg. at 22-23 (J.A. 461-462), but respondents remain willing to provide the Court with the criteria.

[3] Two previous habeas petitions were filed on behalf of Hamdi. In accordance with this Court's decision in Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002), those petitions were dismissed for lack of jurisdiction.

at 2. The petition seeks Hamdi's release and certain other relief. See id. at 7.[4]

Before respondents had been served with the petition, the district court appointed the federal public defender as "counsel for the Petitioner," and ordered respondents to allow the public defender to meet with Hamdi in private. June 11, 2002 Order at 2-3. Respondents appealed the June 11 Order (J.A. 30-33), and this Court stayed "all proceedings before the district court" involving Hamdi. On July 12, 2002, the Court reversed the district court's June 11 Order, and remanded for further proceedings. 296 F.3d 278. The Court specifically instructed that, "[u]pon remand, the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." Id. at 284.

On July 18, 2002, before this Court had issued the mandate or lifted the stay in connection with the prior appeal, the district court ordered respondents to file their return by July 25.[5] While objecting to the district court's effort to proceed before the

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[4] The petition also alleges that, "[t]o the extent that [the President's Order of November 13, 2001] disallows any challenge to the legality of [Hamdi's] detention by way of habeas corpus, the Order and its enforcement constitute an unlawful suspension of the Writ." Pet. ¶ 25. As respondents have explained, however, the President's Military Order has no application to Hamdi in his present situation, see Return at 14, and petitioners appear to have abandoned that claim.

[5] The district court proceedings on remand from this Court's prior decision are described in more detail in Respondents-Appellants' Opposition to Petitioners-

mandate had issued and in the face of this Court's stay, respondents filed a combined return and motion to dismiss (J.A. 34-62). That filing included the sworn declaration of the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, who has been substantially involved with issues related to the detention of enemy combatants in connection with the current war. The Mobbs Declaration (J.A. 61-62) explained the circumstances surrounding Hamdi's capture and the military's determination to detain him as an enemy combatant. See pp. 5-6, supra.

On July 31, 2002, after receiving petitioners' traverse and response to respondents' motion to dismiss (J.A. 63-128), the district court set a hearing for August 8. July 31 Order at 1. In addition, the district court's July 31 Order (J.A. 141-142) directed respondents to produce by August 6, "for in camera review by the Court," specified materials concerning Hamdi "redacted to protect any intelligence matters not within the scope of this inquiry into Hamdi's legal status." July 31 Order at 1. In particular, the court demanded "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi"; the names and addresses of "all the interrogators who have questioned Hamdi"; "statements by members of the Northern Alliance regarding [Hamdi]"; a list of "the date of Hamdi's capture" and "all the dates

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Appellees' Motion to Dissolve Stay in No. 02-6895, at 3-6. Appended to that opposition are copies of the relevant orders and hearing transcripts.

and locations of his subsequent detention"; and the identity of the government official, or officials, who made certain determinations with respect to Hamdi's detention as an enemy combatant. Id. at 1-2.

On August 5, 2002, respondents moved for relief from the district court's production order, explaining, again, that the court lacked authority to act before this Court issued its mandate and lifted the stay in the prior appeal, and that the court's production demands were inconsistent with the terms of this Court's prior decision. Before the district court acted on that motion, petitioners asked this Court to dissolve the stay of "all proceedings." On August 8, this Court issued an order dissolving the stay and issuing the mandate in the prior appeal. The Court further directed the district court to "proceed in strict compliance with our July 12, 2002 decision." Aug. 8 Order at 1. "In accordance with the principles set forth in that opinion," the Court further directed the district court to "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Id. at 2.

On August 13, 2002, the district court held a hearing (see J.A. 325-424) during which it repeatedly stated its intent to take the Mobbs Declaration "piece by piece," Tr. of Aug. 13, 2002 Hrg. at 9, 27, 31, and to "pick it apart," id. at 41. The court stated that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," and that he "had a firearm" when he surrendered. Id. at 51; see id. at 72

("He was there to fight. And that's correct."). But the court had numerous questions about the declaration, including whether there is "anything in the Mobbs' Declaration that says Hamdi ever fired a weapon?," id. at 9; see id. at 43; whether "Mr. Mobbs [is] an employee of the United States?," id. at 10; see id. at 41, 90; "[w]hat does affiliation mean?," id. at 13; see id. at 37; and "what distinguishes a Northern Alliance unit from a Taliban unit?," id. at 40. In addition, the court expressed concern that Hamdi was not being detained in accordance with certain armed services regulations, and that a "military tribunal" should be convened. See id. at 17-23, 32-33, 43, 82-83, 100.

On August 16, 2002, the district court issued an order finding the government's return and supporting declaration "insufficient" to justify Hamdi's detention. Order at 2. The court stated that "[a] thorough examination of the Mobbs declaration reveals that it leads to more questions than it answers," id. at 9, and that it is "necessary to obtain the additional facts requested." Id. at 14. The court further ordered respondents to produce for its ex parte, in camera review, the materials previously demanded in its July 31 Order, together with the screening criteria that respondents had offered in their return to provide the court but explained were not necessary for it to review to dispose of this case. Id. at 2; see note 2, supra.

On August 21, 2002, the district court certified for appeal the question quoted on page 2, supra, concerning the sufficiency of the Mobbs Declaration. On

September 12, 2002, this Court granted respondents' petition to appeal the August 16 Order, and all "issues fairly included within th[at] order." Order at 2.

SUMMARY OF ARGUMENT

The district court's August 16 Order should be reversed and the case dismissed.

I. In concluding that the government's return and supporting declaration are insufficient to justify Hamdi's detention, the district court disregarded the fundamental separation-of-powers principles on which this Court's prior decision was grounded. In our constitutional system, the responsibility for waging war is committed to the political branches. The United States took control of Hamdi in Afghanistan while waging a military campaign launched by the Commander in Chief, with the express statutory support of Congress. The military's determination to detain him as an enemy combatant therefore is entitled to the strongest possible constitutional weight and, in fact, this Court already has stated that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi, 296 F.3d at 283.

The government has shown that Hamdi is such an enemy combatant. The sworn declaration accompanying the return explains, inter alia, that Hamdi surrendered with an enemy unit in the theatre of battle while armed with an AK-47. Hamdi is thus a prototypical battlefield combatant subject to capture and detention

in war. And the declaration accordingly satisfies any constitutionally appropriate standard of review in this case. Such review must reflect the Constitution's textual commitment of the conduct of war to the political branches. Indeed, in reviewing habeas challenges to executive determinations much less constitutionally sensitive than the fundamental military judgment at issue here, courts have only called upon the Executive to provide "some evidence" to support its determinations. The Mobbs Declaration more than satisfies that standard.

In reaching a contrary conclusion, the district court applied a hyper-critical standard of review antithetical to the "great deference" that this Court itself called for in its prior decision. Hamdi, 296 F.3d at 281. Far from proceeding with the requisite deference, the district court declared that it was "challenging everything in the Mobbs Declaration," Tr. of Aug. 13 Hrg. at 27, and then set out to "pick it apart," id. at 31. The nature and number of alleged deficiencies identified by the court underscore how far it strayed from this Court's instructions, and well illustrate the "special hazards" foreseen by this Court with respect to "judicial involvement in military decision-making." Hamdi, 296 F.3d at 283. What is more, despite all that, even the district court did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban" and "had a firearm" when he surrendered. Tr. of Aug. 13 Hrg. at 51. That speaks volumes about the factual showing that the government did make.

The district court's conclusion that the government's submission is insufficient is inexplicable in another respect. The court acknowledged that "[p]etitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities" was lawful. Aug. 16 Order at 8. Hamdi's status as an enemy combatant did not change when he left Afghanistan. Nor did that transfer obligate the armed forces to assemble additional evidence or satisfy a more demanding standard to continue to hold him as an enemy combatant in a more secure environment.

II. The district court's sweeping production order stems from a failure to recognize the same separation-of-powers principles. The materials demanded by the court include information that directly implicates sensitive national security matters concerning the conduct of an ongoing war, potential intelligence in the hands of the enemy, and military decisionmaking with respect to the appropriate facilities for detaining the enemy. More fundamentally, the production order confirms that the district court is applying a de novo standard of review to the military's battlefield judgments, and is preparing to conduct a full-blown evidentiary proceeding, in which the military personnel who have interviewed Hamdi may be called as witnesses. As this Court has recognized, that kind of judicial inquiry "would stand the warmaking powers of Article I and II on their heads." Hamdi, 296 F.3d at 284.

III. By rejecting the adequacy of respondents' return and accompanying

declaration and ordering the production of additional factual materials, the district court's August 16 Order necessarily rejects respondents' motion to dismiss. That decision, too, is erroneous, and this Court should reverse the district court's order and remand with instructions to dismiss the petition outright. Although the district court and petitioners have raised certain additional, purely legal objections to Hamdi's detention, this Court may readily dispose of those arguments in this appeal. Remanding the case for consideration of those legal arguments or any other proceedings would only unnecessarily prolong this litigation, and in all likelihood invite the need for further appellate superintending by this Court. The military has shown that Hamdi's detention is lawful. The case should come to an end.

STANDARD OF REVIEW

This appeal presents legal issues concerning the appropriate role of the courts in reviewing the military's detention of a captured enemy combatant in wartime. In particular, the Court must determine whether the district court erred as a matter of law in concluding that the government's return and supporting declaration are insufficient to justify the challenged detention, and that production of the additional materials demanded by the court is necessary or proper. The Court reviews de novo such questions of law. See Farmer v. Employment Sec. Comm'n of N.C. 4 F.3d 1274, 1279 (4th Cir. 1993); Jordan v. Southern Ry. Co., 970 F.2d 1350, 1352 (4th Cir.

1992); see also United States v. Brown, 155 F.3d 431, 433 (4th Cir. 1998).

ARGUMENT

THE DISTRICT COURT'S AUGUST 16 ORDER SHOULD BE SET ASIDE

As this Court recognized in its prior decision in this case, this habeas action "arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable." Hamdi, 296 F.3d at 281; accord Thomasson v. Perry, 80 F.3d 915, 924-926 (4th Cir.), cert. denied, 519 U.S. 948 (1996); Tiffany v. United States, 931 F.2d 271, 277-278 (4th Cir. 1991). The action challenges the authority of the Commander in Chief and the armed forces under his command to detain an enemy combatant captured in a zone of active combat operations in a foreign land during an ongoing armed conflict. That exercise of Executive authority falls within the President's core war powers and, with respect to the present conflict, and is also supported by the express statutory endorsement of Congress. Hamdi, 296 F.3d at 281-282.

The extraordinary context in which this action arises informs the proper role of the courts in adjudicating the petition at issue. As this Court has emphasized, in our constitutional system, "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants." Hamdi, 296 F.3d at 283; see ibid. ("[T]he conduct of combat operations has been left to [the political branches].")

(citing Ex parte Quirin, 317 U.S. 1, 25-26 (1942)). Accordingly, courts owe "great deference" to "military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Id. at 281. So too, "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at 283; see id. at 284.

In the prior appeal, this Court concluded that "[i]t was inattention to these cardinal principles of constitutional text and practice that led to the errors" in the district court's June 11 Order. Hamdi, 296 F.3d at 282. As explained below, the August 16 Order at issue in this appeal stems from the district court's inattention to the same "cardinal principles," and it should also be set aside.

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE RETURN AND SUPPORTING DECLARATION ARE INSUFFICIENT

The district court's conclusion that the government's return and accompanying declaration are insufficient to justify Hamdi's detention is tainted by two overriding, and interrelated, legal errors. First, the court openly resisted the settled legal principles recognized by this Court – in this case – concerning the military's authority to detain captured combatants in wartime, and the limited role of the courts in

reviewing such determinations. Second, rather than affording the Mobbs Declaration the requisite deference, the district court attacked it with open hostility, even to the point of questioning whether Mr. Mobbs actually works for the Department of Defense. As explained below, under any constitutionally appropriate standard of review, the declaration provides a more than adequate basis for the military's determination that Hamdi is an enemy combatant.

A. The Military's Detention Of Enemy Combatants In Connection With Ongoing Hostilities, Including The Current Conflict, Is Lawful

In the prior appeal, this Court stated that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Hamdi, 296 F.3d at 283. That statement is correct, and controls the outcome in this case.

1. As this Court recognized in the prior appeal, the military's authority to detain enemy combatants during hostilities is supported by the Constitution, Supreme Court and lower court precedent, the laws and customs of war, and, with respect to the current conflict, the express statutory authorization of Congress. See Hamdi, 296 F.3d at 281-283; see also U.S. Const. art. II, § 2; Auth. for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Quirin, 317 U.S. at 30-31 & n.8; Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); In re Territo, 156 F.2d 142, 145 (9th

Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913); L. Oppenheim, International Law 368-369 (H. Lauterpacht ed., 7th ed. 1952).[6]

It is similarly settled that the military's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See Hamdi, 296 F.3d at 283 (parenthetical discussing Quirin, 317 U.S. at 31); see also Quirin, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful"); Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) ("[T]he petitioner's citizenship in the United States does not * * * confer upon him any constitutional rights not accorded any other belligerent under the laws of war."), cert. denied 352 U.S. 1014 (1957); In re Territo, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America.").

The United States military has captured and detained enemy combatants in connection with virtually every major conflict in the Nation's history, including more

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[6] The military's authority to capture and detain enemy combatants applies to both "lawful" and "unlawful" combatants. Quirin, 317 U.S. at 30-31. Unlawful combatants, or belligerents, do not meet the requirements for status as prisoner of war under the Geneva Conventions. See id. at 31; see id. at 35. With respect to the current conflict, the President has determined that al Qaeda and Taliban detainees are unlawful combatants. See p. 41, infra.

recent conflicts such as the Gulf, Vietnam, and Korean wars. During World War II, the United States detained hundreds of thousands of prisoners of war in the United States (some of whom were, or claimed to be, American citizens) without trial or counsel. As this Court recognized in the prior appeal, the military's longstanding authority to detain enemy combatants in wartime applies squarely to the current conflict, in which the stakes are no less grave. Hamdi, 296 F.3d at 283.

2. The district court openly questioned that settled authority and expressed "reservations regarding the implications" of this Court's own statement in the prior appeal that Hamdi's detention is lawful as long as he "'is indeed an "enemy combatant" who was captured during the hostilities in Afghanistan.'" Aug. 21 Order at 5 (quoting Hamdi, 296 F.3d at 283); see id. at 7 (expressing same "reservations"). In addition, notwithstanding this Court's prior ruling, the district court suggested that the military's present detention of Hamdi raises "grave consequences for numerous Supreme Court precedents and their progeny," including, the district court believed, Riverside v. McLaughlin, 500 U.S. 44 (1991); Miranda v. Arizona, 384 U.S. 436 (1966); and Gideon v. Wainwright, 372 U.S. 335 (1963). Aug. 21 Order at 6; see Tr. of Aug. 20 Hrg. at 18 (discussing McLaughlin, Miranda, and Gideon).[7]

[7] Referring to a report issued by the American Bar Association, the district court also suggested that the government's use of the term "enemy combatant" is novel. See Aug. 21 Order at 5. In fact, however, the term was used in a similar vein

That was clear error. This Court's decision in the prior appeal – and its specific recognition that Hamdi's detention is lawful if he is an enemy combatant – is law of the case and thus binding in "subsequent stages" of this case. United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999). Moreover, the legal principles recognized by this Court concerning wartime detentions are well-settled and in no way inconsistent with decisions such as McLaughlin, Miranda, or Gideon. Those cases, of course, involved application of criminal law and procedure. Hamdi has not been charged with any crime, or even any specific offense under the laws of war. Instead, he is being detained by the military to prevent him from continuing to aid the enemy in the ongoing war and to enable the military to gather intelligence that may assist it in seeking to defeat the enemy and protect the Nation against future attacks. It has long been recognized that such "'[c]aptivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, Military Law and Precedents 788 (2d ed. 1920); see also Territo, 156 F.2d at 145 ("The object of

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by the Supreme Court more than 50 years ago in Quirin, 317 U.S. at 31, and in In re Yamashita, 327 U.S. 1 (1946). See id. at 7 ("In [Quirin], we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war."); see also id. at 11, 13 n.1, 19, 20, 24 n.10; Madsen v. Kinsella, 343 U.S. 341, 355 (1952). The term "enemy belligerent," which the Yamashita Court used interchangeably with "enemy combatant," see 327 U.S. at 9-10, 20, also is not new. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); Duncan, 327 U.S. at 313; see also I. Detter, The Law of War 136-137 (2d ed. 2000) (combatants).

capture is to prevent the captured individual from serving the enemy.").

The entirely different paradigm in which this case arises – wartime detention of combatants, rather than criminal punishment – provides a complete answer to the district court's reservations, and to petitioners' legal challenge. There is no obligation under the laws and customs of war for captors to charge detainees with an offense and, indeed, the vast majority of combatants seized during war are detained without charges. Similarly, there is no general right to counsel under the laws and customs of war for those detained as enemy combatants. Even under the Third Geneva Convention, detainees with prisoner-of-war status – which Hamdi lacks, see p. 41, infra – have no right to counsel to challenge their detention. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (GPW), Article 105.[8]

The Constitution does not supply any different guarantee. The Sixth Amendment applies only to "criminal prosecutions," U.S. Const. amend. VI, and therefore does not apply to the detention of enemy combatants who have not been

[8] Article 105 of the GPW provides that a prisoner of war should be provided with counsel to defend against charges brought against him in a trial proceeding at least two weeks before the opening of such trial. But the availability of that trial right only underscores that prisoners of war who do not face such charges are not entitled to counsel, or access to counsel, simply to challenge the fact of their wartime detention.

charged with any crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial."). Similarly, the Self-Incrimination Clause of the Fifth Amendment is a "trial right of criminal defendants," and therefore also does not extend to this situation. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added).

Any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of any right to prompt charges or counsel for those held as enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993) (looking to "[h]istorical practice" in evaluating scope of "Fourteenth Amendment's guarantee of due process" in criminal procedure context); see also Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909). As the Supreme Court stated in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." As discussed above, under that well-settled body of law, the military's detention of captured enemy combatants without counsel or charges is

lawful for at least the duration of the underlying conflict.[9]

The district court did not question that the "German soldier captured at the Battle of the Bulge" was not entitled to counsel to challenge his detention. Tr. of Aug. 13 Hrg. at 26. But it inexplicably rejected application of that principle to the detainee here, who was captured as part of an enemy unit in the combat zone in Afghanistan. As this Court emphasized in the prior appeal, while the current conflict may be less conventional than prior wars, the "unconventional aspects of the present struggle" in no way divest the military of its settled authority to capture and detain enemy combatants in its effort to prevail in that struggle. Hamdi, 296 F.3d at 283.

B. The Government Has Shown That Hamdi Is Indeed An Enemy Combatant Captured During The Hostilities In Afghanistan

Although the petition itself raises legal objections to Hamdi's detention without specifically challenging Hamdi's status as an enemy combatant, the government's

[9] The district court suggested that Quirin establishes that enemy combatants enjoy much broader due process protections, including "access to counsel and the opportunity to defend [themselves] before a military tribunal." See Aug. 16 Order at 8. That is incorrect. The captured combatants in Quirin were charged with violations of the laws of war and of the Articles of War – offenses punishable by death – and tried before a military commission. 317 U.S. at 22-23. Accordingly, the saboteurs were provided counsel by the military to aid in preparing a response to those charges. Hamdi has not been charged with any offense and has not been subjected to any military trial or punishment. Quirin, therefore, provides no support for any claim to access to counsel with respect to the simple wartime detention of the detainee at issue in this case.

return and supporting declaration explain why Hamdi is indeed such a combatant. The military's determination that Hamdi is an enemy combatant is supported by common sense and an adequate evidentiary basis, and should be given effect.

1. The role of the courts in adjudicating a habeas petition filed on behalf of a captured enemy combatant is extremely limited. That is especially so when it comes to second-guessing the basic factual determination made by military forces on the ground in a foreign land that a particular individual is part of an enemy force and should be held as an enemy combatant. As this Court emphasized in the prior appeal, the enormous deference owed to the political branches in matters involving foreign relations and national security "extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." Hamdi, 296 F.3d at 281. So too, "the standard for reviewing the government's designation of Hamdi as an enemy combatant" is shaped by fundamental "[s]eparation of powers principles." Id. at 283.

The Executive's determination that an individual is an enemy combatant is a quintessentially military judgment. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander in Chief, and as spokesman for the nation in foreign affairs, had the final say.")

(Douglas, J., concurring); cf. Ludecke v. Watkins, 335 U.S. 160, 170 (1948); Eisentrager, 339 U.S. at 789. Moreover, the military has a unique institutional capacity to make that determination. In the course of hostilities, the military through its operations and intelligence-gathering has an unparalleled vantage point from which to learn about the enemy, and make judgments as to whether those seized during a conflict are friend or foe. See Hamdi, 296 F.3d at 283 ("The political branches are best positioned to comprehend this global war in its full context."); see also Minns v. United States, 155 F.3d 445, 451 (4th Cir. 1998) ("[T]he 'complex, subtle, and professional decisions' of how to protect American soldiers in time of war and how to administer such protection are decisions that are 'essentially professional military judgments,' overseen by the Legislative and Executive Branches."). And the Executive is politically accountable for the decisions made in prosecuting war, and in defending the Nation. See Thomasson, 80 F.3d at 924.

Conversely, the Judiciary, as this Court itself has recognized, lacks institutional competence, experience, and accountability in making such military judgments. See Hamdi, 296 F.3d at 283 ("The executive is best prepared to exercise the military judgment attending the capture of alleged combatants."); see Thomasson, 80 F.3d at 926 ("[T]he lack of competence on the part of the courts [with respect to military judgments] is marked") (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)); Tozer

v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) ("The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government."). That lack of competence is particularly pronounced when it comes to second-guessing the military's determination that an individual seized on a battlefield in a foreign land is an enemy combatant.

At the same time, the need for judicial deference to military decisionmaking "also arises from the unique role that national defense plays in a democracy." Thomasson, 80 F.3d at 925. "[O]ur nation's very preservation hinges on decisions regarding war and preparation for war." Ibid. The military determination at issue in this case – the decision to detain someone who was armed with an assault rifle when he surrendered in a combat zone as part of an enemy unit – directly implicates the national defense, not to mention the safety of American soldiers still stationed in the zone of conflict, and falls at the heart of the military's ability to conduct war. That is especially true today, when the Nation is at war with an unprincipled enemy that has committed unspeakable atrocities on American soil and has made clear its intent to attempt additional attacks. As such, the military determination at issue here calls for extraordinary deference from the courts.

2. Proper respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit the courts to the consideration of legal attacks on detention of the type considered in Quirin and Territo, and raised by the petition in this case (see Pet. ¶¶ 21-25). At most, however, in light of the fundamental separation-of-powers principles recognized by this Court's prior decision and discussed above, a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant. And when, as here, the Executive provides such a basis, there is no further role for evidentiary hearings or intrusive production orders aimed at reconstructing the exact circumstances surrounding an enemy combatant's capture or detention in the heat of war.

In evaluating habeas challenges to analogous – but much less constitutionally sensitive – executive determinations, courts have refused to permit use of the writ to challenge the factual accuracy of such determinations, and instead call upon the Executive only to show "some evidence" supporting its determination. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence

to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. Samuels, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."). The role of a court in such actions is limited to confirming that there was some basis for the challenged executive determination, and not to undertake a de novo determination for itself.

Similarly, in Moyer v. Peabody, 212 U.S. 78 (1909), the Supreme Court rejected the due process challenge of a person who had been detained without probable cause for months by a governor acting in his capacity of "commander-in-chief of the state forces" during a local "state of insurrection." Id. at 82. Justice

Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." Id. at 85. Pointing to Moyer, the Court in United States v. Salerno, 481 U.S. 739, 748 (1987), stated that "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous." See also United States v. Chalk, 441 F.2d 1277, 1282 (4th Cir.) ("It is enough, we think, that there was a factual basis for the mayor's decision to proclaim the existence of a state of emergency and that he acted in good faith."), cert. denied, 404 U.S. 943 (1971).

The basic considerations underlying the limited scope of judicial review of the sorts of executive determinations involved in the foregoing cases are only magnified when the determination at issue is the military's decision that someone seized in the midst of active hostilities in a foreign land is an enemy combatant. Thus, at a bare minimum, that executive determination should be deferred to by the courts as long as the military provides a factual basis to support it.

3. Respondents here have provided an ample factual basis to support the military's determination that Hamdi is an enemy combatant. The Mobbs Declaration

explains the key events surrounding Hamdi's capture and detention. In particular, the declaration explains that Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; stayed with the Taliban after September 11 and after the United States and coalition forces launched the military campaign in Afghanistan; and was captured when his Taliban unit surrendered to – and, indeed, laid down arms to – coalition forces. Mobbs Decl. ¶¶ 3-5, 9. The declaration further explains that Hamdi's own statements confirm that he affiliated with an enemy unit, and was armed when that unit surrendered. Id. ¶ 9; see J.A. 61-62.

As a matter of common-sense, an individual armed with an AK-47 who surrenders with enemy forces in a combat zone manifestly qualifies as an enemy combatant. Indeed, such a person is the archetypal enemy combatant. Cf. Quirin, 317 U.S. at 38 ("Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.") (emphasis added); id. at 32-33 & n. 10 (discussing unlawful enemy combatants "lurking about the posts, quarters, fortifications and encampments of the armies of the United States"); L. Oppenheim, International Law 223 (5th ed. 1935) (Citizens of even neutral states, "if they enter the armed forces of a belligerent, or do certain other things in his favour, * * * acquire enemy character."); id. at 224 ("[D]uring the World War hundreds of subjects

of neutral States, who were fighting in the ranks of the belligerents, were captured and retained as prisoners until the end of the struggle.").

Indeed, even if Hamdi had not been armed when he surrendered, it still would have been proper for the military to detain him. It is settled under the laws and customs of war that the military's authority to detain individuals in wartime extends to non-combatants who enter the theatre of battle as part of the enemy force, including clerks, laborers, and other "civil[ian] persons engaged in military duty or in immediate connection with an army." Winthrop, supra, at 789; see Detter, supra, at 135-136; GPW art. 4(A)(4), 6 U.S.T. 3316 (recognizing that individuals who can be detained as prisoners of war include "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces"); Hague Convention of 1907, art. 3, 36 Stat. 2277 ("The armed forces of the belligerent parties may consist of combatants and non-combatants" who in "case of capture" may be detained as prisoners of war).[10]

[10] In a more traditional war between nation states, all inhabitants of a belligerent nation may be treated under the laws and customs of war as enemies. See Miller v. United States, 78 U.S. 268, 310-311 (1870) (In the context of determining rights to confiscated property, "[i]t is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."); Lamar,

C. The District Court's Contrary Conclusion Is A Product Of Its Own, Undue Suspicion In Reviewing The Mobbs Declaration

In concluding that the government's return and supporting declaration are insufficient to dispose of this action, the district court disregarded the fundamental separation-of-powers principles set forth in this Court's prior decision, and applied a hyper-critical, legally erroneous, and wholly inappropriate standard of review.

1. The district court disregarded the clear mandate of this Court's prior decision, as well as the authorities discussed above, and subjected the government's submission to open "suspici[on]" (Aug. 16 Order at 13), rather than the "great deference" called for by this Court's prior decision. Hamdi, 296 F.3d at 281. Indeed, the district court made clear that it was reviewing the Mobbs Declaration "piece by piece," and was "challenging everything in the Mobbs Declaration." Tr. of Aug. 13 Hrg. at 9, 27, 41. At the same time, the district court made clear that its critical approach stemmed from its frustration with this Court's order to "consider the

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Executor v. Browne, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies."); Juragua Iron Co. v. United States, 212 U.S. 297, 308 (1909) (those who reside in enemy territory "are adhering to the enemy so long as they remain with his territory"). Moreover, in a more traditional war, the combatants of the belligerent nation would wear distinctive insignia and follow the laws and customs of war. See Quirin, 317 U.S. at 35. The fact that the enemy in the current war purposely blurs the lines between combatants and non-combatants and refuses to wear distinctive insignia require if anything giving the armed forces more deference in determining who among those seized in the theatre of battle qualify as enemy combatants.

sufficiency of the Mobbs Declaration as an independent matter before proceeding further." Tr. of Aug. 13 Hrg. at 3. Thus, the district court bluntly stated, "If I'm to rely on only this [Mobbs Declaration], then I must pick it apart. * * * If you gave me the information [requested in the production order], you know, then all of this probably could have been avoided." Id. at 32 (emphasis added); see id. at 27("You have quite rightly, according to the Fourth Circuit, not given me anything evidently"); id. at 39 ("All I want is the papers. If I had seen the papers, we probably would have ended this a long time ago. Now I'm curious. I get more curious all the time.").

The district court's August 16 Order confirms its intent to "pick apart" the declaration without regard to the appropriate standard of review. For example, the court stated:

- The declaration does not state whether Mr. Mobbs is "a paid employee of the government." Aug. 16 Order at 10.
- The declaration "does not say where or by whom [Hamdi] received weapons training or the nature and extent thereof. * * * Did someone give him a weapon and say 'here's the safety and there's the trigger?'" Id. at 11 & n.5.
- The declaration "does not indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance." Id. at 11.
- "Whether the forces he surrendered to was [sic] led by a 'war lord' or the unidentified unit to which he was 'affiliated' was led by a 'war lord' or whether the war lords changed sides is not set forth." Id. at 12.

- "A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the 'if necessary' connotes. Does it mean in self defense or did a threatened force from the Taliban make it 'necessary?'" Ibid.

The transcript of the August 13 hearing contains numerous other examples of the court's effort to pick apart the declaration, including its criticism that the declaration failed to state "that Hamdi shot at anyone." Tr. of Aug. 13 Hrg. at 9; see id. at 43.

Furthermore, the district court hypothesized that the government might have attempted to "hide things" in characterizing the military's determination that Hamdi is an enemy combatant, and stated that it was "suspicious" of assertions made in the government's sworn affidavit. See Tr. of Aug. 13 Hrg. at 39 ("[W]hen people hide things you can generally assume if it were advantageous to them they wouldn't hide it, would they?"); Aug. 16 Order at 13 ("Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made."); Tr. of Aug. 20 Hrg. at 19 ("[Mr. Mobbs] would have known a lot of information which he has deliberately omitted from the declaration."). In other words, instead of deference, the court applied distrust.

The district court's unabashed refusal to review the Mobbs Declaration in accordance with the principles of judicial restraint mandated by this Court, not to mention the Constitution, in itself requires reversal of its August 16 Order.

2. None of the alleged deficiencies identified by the district court calls into question the military's determination that Hamdi is an enemy combatant. As discussed above, to prevail under a constitutionally appropriate standard, the government would at most need to provide some factual basis supporting the military's determination that Hamdi is an enemy combatant. The Mobbs Declaration does that, and more. See pp. 30-32, supra. And an examination of the perceived short-comings identified by the district court only further bolsters the conclusion that the Mobbs Declaration provides a sufficient factual basis for the military's determination that Hamdi is indeed an enemy combatant.

Declarant. The district court objected to the particular declarant in this case. As the declaration explains, however, Mr. Mobbs is "a Special Advisor to the Under Secretary of Defense for Policy," and, in that role, has "been substantially involved with matters related to the detention of enemy combatants in the current war." Mobbs Decl. ¶ 1; see 67 Fed. Reg. 35595, 35596 (May 20, 2002) (referring to position). Moreover, Mr. Mobbs has reviewed the "relevant records and reports," including Hamdi's own statements, and is "familiar with the facts and circumstances related to

the capture of [Hamdi] and his detention by U.S. military forces." Mobbs Decl. ¶¶ 2, 9. Given Mr. Mobbs's position within the Department of Defense, there is no basis for the district court's skepticism as to his federal employment status.

Mr. Mobbs himself has not determined that Hamdi is an enemy combatant. Rather, as the declaration makes clear, that determination was made by military authorities in Afghanistan under the authority of the Commander, U.S. Central Command, who oversees the combat operations there. Mobbs Decl. ¶¶ 5-8. Requiring the military to submit the testimony of the armed forces – in Afghanistan – who determined that Hamdi was an enemy combatant, or the testimony of other officials more directly engaged in the war, would unnecessarily divert the military's attention and resources from the ongoing war effort and invite the special dangers recognized by this Court and the Supreme Court. See Hamdi, 296 F.3d at 284; Eisentrager, 339 U.S. at 779 (1950) ("It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.").

Affiliation With The Taliban. The district court raised numerous questions about Hamdi's Taliban unit and his involvement in the shooting war. See Aug. 16 Order at 11-12 (declaration does not identify Hamdi's Taliban unit, "who commanded

the unit," and whether it "was ever in any battle"); Tr. of Aug. 13 Hrg. at 43 ("I don't know of any weapon he ever fired, I don't know of anything he did, other than to be present with a Taliban unit according to them."). At the same time, however, the district court stated that it did not have "any doubts [Hamdi] went to Afghanistan to be with the Taliban," and that Hamdi "had a firearm" when he surrendered. Tr. of Aug. 13 Hrg. at 51; see id. at 72 ("He was there to fight. And that's correct.").

The district court recognized that Hamdi "was present with a Taliban unit," "had a firearm," and even that he "was there to fight." Thus, despite all its misplaced suspicion, the district court itself did not doubt all that is needed, and more, to confirm the legality of Hamdi's detention. There certainly is no added legal requirement that an armed enemy combatant actually fire his gun. Indeed, it is difficult to conceive how military authorities in the field could credibly determine which members of an enemy unit did or did not fire their weapons.

Northern Alliance, Taliban, And War Lords. The district court stated concerns about the relationship between Taliban and Northern Alliance forces in Afghanistan, and the history of strife in that country involving "war lords." Aug. 16 Order at 12; see Tr. of Aug. 13, 2002 Hrg. at 16 ("The problem with the Taliban is that these are all warlords, are they not?"); see id. at 65 ("How can the Taliban distinguish themselves from the Northern Alliance?"); id. at 67-68 (discussing "history of the

area"); id. at 71 ("What worries me is [Hamdi] happened to be in one of these fiefdoms."). The district court's speculations on such matters, however, provide no basis for second-guessing the military's determination that Hamdi is an enemy combatant who affiliated with a Taliban unit. Indeed, if anything, they underscore the need for courts to defer to the judgments of the military commanders in the field, who occupy the best vantage point to evaluate such considerations and distinguish between trusted allies and those associated with the enemy.

Screening Criteria. The district court stated that the declaration fails to provide sufficient information about "screening criteria" used by the military to determine whether to continue to detain individuals found to be enemy combatants. Aug. 16 Order at 11, 13. Respondents, however, offered to provide the court with further information about those criteria in a classified filing that would be submitted ex parte and under seal, but explained that review of those criteria is not necessary to conclude that the petition should be dismissed (for the reasons set forth in the government's return). See Return at 3 n.1. The district court did not ask to see the criteria until its August 16 Order, when it criticized the government for not providing more information about the criteria in the Mobbs Declaration.[11]

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[11] Respondents then informed the district court, again, that they would provide the court with the criteria ex parte and under seal, see Resp. Mot. for Certification of Interlocutory Appeal and Stay at 2 n.1, but the court instructed respondents not to do

In any event, as the government stated in its return (at 3 n.1), review of the screening criteria is not necessary to resolve this petition. The return and supporting declaration explain the circumstances underlying the military's determination that Hamdi is an enemy combatant. As the declaration indicates, the screening criteria themselves are used to determine not whether an individual is an enemy combatant vel non, but instead to determine which captured enemy combatants have sufficient intelligence value to justify their transfer into United States custody or continued detention by the United States. See Mobbs Decl. ¶¶ 7-8. That determination takes into account additional considerations that distinguish among captured enemy combatants, but are not necessary to the underlying determination that a detainee is an enemy combatant in the first place.

Unlawful Enemy Combatant. The district court stated that "the declaration never refers to Hamdi as an 'illegal' enemy combatant." Aug. 16 Order at 10. But, as explained in the government's return (at 8-9 n.5), the military's authority to detain Hamdi is not dependent on the fact that he is an unlawful, rather than lawful, enemy combatant. See note 6, supra. As the Supreme Court made clear in Quirin, 317 U.S.

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so unless they were prepared to provide the court with all the materials subject to its August 16 production order. Tr. of Aug. 20 Hrg. at 22-23 (J.A. 461-462). If this Court wishes to review the screening criteria, respondents will file them with the Court ex parte and under seal.

at 30-31, the military may "capture and det[ain]" both types of combatants, though under the laws and customs of war unlawful combatants are also subject "to trial and punishment by military tribunals for acts which render their belligerency unlawful." Id. at 31. The military has not sought to punish Hamdi for violation of the laws or customs of war, and petitioners challenge only his continuing detention. Accordingly, in resolving this habeas action, there is no need for the court to decide whether Hamdi is an unlawful enemy combatant.

In any event, even if this Court determined that it was necessary to the resolution of this habeas action to decide whether Hamdi is an unlawful enemy combatant, there would be no need for the military to provide any additional factual basis to support that conclusion. The Mobbs Declaration states that the military has determined that Hamdi is an enemy combatant based, inter alia, on "his association with the Taliban." Mobbs Decl. ¶ 6. The President, in his capacity as Commander in Chief, has conclusively determined that the Taliban are unlawful combatants and, as such, are not entitled to prisoner-of-war status under the Geneva Convention. United States v. Lindh, 212 F. Supp. 2d 541, 554-555 (E.D. Va. 2002) ("On February 7, 2002, the White House announced the President's decision, as Commander in Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW

status under the Geneva Conventions."); White House Fact Sheet, Status of Detainees at Guantanamo, Office of the Press Secretary, Feb. 7, 2002 (www.whitehouse.gov/news/releases/2002/02/20020207-13).

National Security. The district court stated that the government has failed to explain why Hamdi's continuing detention "serves national security." Aug. 21 Order at 7. The military is not required to present any individualized threat assessment with respect to enemy combatants seized on the battlefield in wartime. In any event, as the government has made clear, Hamdi is to being detained for the reasons that captured combatants have always been detained in war: to prevent him from continuing to aid the enemy while hostilities continue, and to gather intelligence. See Return at 21; Tr. Aug. 13 Hrg. at 23-24. In addition, respondents have submitted in this case the Woolfolk Declaration, which explains, in particular, why the military's detention of Hamdi and other al Qaeda and Taliban detainees is vital to the national security as part of the ongoing war effort to gain intelligence about the enemy.[12]

3. The district court's August 16 Order invites the "special hazards" foreseen by this Court with respect to the "development of facts" in this sensitive area of

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[12] Although the Woolfolk Declaration was initially filed in this Court, respondents provided a copy of the declaration to the district court along with respondents' August 2, 2002 letter (J.A. 143-147) to this Court concerning the military's decision to resume intelligence-gathering interviews with respect to Hamdi.

"military decision-making." Hamdi, 296 F.3d at 283. It is difficult to believe that the government would ever be able to resolve all the sorts of questions or nuances raised by the district court. But even attempting to do so would require a court to conduct an extensive and unprecedented evidentiary proceeding to try to recreate the circumstances surrounding Hamdi's capture and detention on a foreign battlefield. That exercise would be made even more difficult in this case by the fact that Hamdi initially surrendered to coalition forces, rather than to United States forces, an event that is not uncommon when United States forces are fighting alongside allies.

Requiring the government even to attempt to address the supposed deficiencies identified by the district court, and to respond to the district court's "suspicio[ns]" (see Aug. 16 Order at 13), would result in a full-blown evidentiary proceeding in which American commanders would be called, if not directly then effectively, "to account in federal courtrooms." Hamdi, 296 F.3d at 284. What is more, it would invite courts to substitute their own judgment for that of the military in the field who have first-hand knowledge of the circumstances surrounding an individual's detention and the conflict at hand. That result, as this Court itself admonished in the prior appeal, "would stand the warmaking powers of Articles I and II on their heads." Ibid.

D. The District Court Failed To Account For The Fact That Petitioners Do Not Challenge The Battlefield Decision To Detain Hamdi

The district court's conclusion that the government's return and supporting declaration are insufficient is untenable in another respect. Although it recognized that petitioners do not challenge the military's decision to detain Hamdi on the battlefield, the court failed to appreciate the significance of that concession. See Aug. 16 Order at 8 ("Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge."); Pet. Traverse at 2 (Petitioners' claim does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan."); Tr. of June 25, 2002 Arg. in No. 02-6895, at 33 ("Now, we again are not challenging the battlefield determination, decision to detain individuals in the theater of combat.").

Hamdi's status as an enemy combatant did not change when he was removed from Afghanistan. The military's authority to detain him as an enemy combatant is not in any way dependent on his presence in Afghanistan. Nor does the transfer from Afghanistan require the military to submit any additional basis for or evidence in support of his detention. The long-established authority of the military to detain enemy combatants during a period of hostilities applies to the detention of enemy combatants at home as well as abroad. As Territo and Quirin illustrate, that is true

even if the detainees claim American citizenship. Furthermore, such a regime could have disastrous practical consequences for the military and national security. The military often transfers captured combatants from the zone of combat to other locations, including this country, where soldiers who administer such detention facilities are less likely to come under enemy attack.

Although the transfer of an enemy combatant to the United States might arguably affect the analysis of a purely legal challenge to his detention, it does not in any way affect the validity of the military's factual determination that the individual is an enemy combatant. This Court's prior decision (and the discussion above) makes clear that Hamdi's detention is lawful if he is indeed an enemy combatant, and so the fact that petitioners do not challenge the initial detention in Afghanistan provides another, and independently sufficient, reason to dismiss the petition in this case. Even though Hamdi has been removed from the battlefield where he was captured, he is just as much an enemy combatant here as he was in Afghanistan.

II. THE DISTRICT COURT ERRED IN SUBJECTING THE MILITARY TO ITS UNPRECEDENTED PRODUCTION DEMANDS

The corollary to the district court's conclusion that the government's return and declaration are insufficient is its demand that respondents produce the materials listed in its July 31 Order, together with the screening criteria discussed above. Aug. 16

Order at 2. That order, too, places unprecedented demands on the military to justify its detention of a captured combatant in wartime, stems from the same fundamental errors discussed above, and should be set aside.

The breadth of the court's production order is extraordinary and provides still further confirmation that the district court utterly disregarded the separation-of-powers principles at the heart of this Court's prior decision. As discussed above, the August 16 Order requires respondents to produce, for the court's ex parte, in camera inspection, copies of all statements made by Hamdi and the raw notes taken by soldiers in Afghanistan and elsewhere from interviews with him, including interrogations conducted for intelligence-gathering purposes; the names and addresses of anyone who has interrogated Hamdi; statements made by allied forces concerning Hamdi; a detailed accounting of how the military has handled Hamdi; and the names and addresses of military officials who made certain determinations. See August 16 Order at 2 (J.A. 426); July 31 Order at 1-2 (J.A. 141-142).

Those materials directly implicate sensitive national security matters concerning the conduct of an ongoing war, potential intelligence in the possession of the enemy, and the military's decisionmaking with respect to the conduct of war and the appropriate facilities for detaining captured combatants. Although the district court's July 31 Order states (at 1) that "intelligence matters" may be redacted, the

order qualifies that statement by providing that such redaction is limited to "intelligence matters not within the scope of this inquiry into Hamdi's legal status." (Emphasis added.) The order thus expressly contemplates that intelligence matters related to Hamdi may not be redacted. Moreover, as discussed above, the sorts of questions raised by district court at the August 13 hearing and in its August 16 Order demonstrate that the court has a fundamentally flawed understanding of the proper "scope of this inquiry of Hamdi's legal status."[13]

The production order leaves no doubt that the district court is applying an improper, de novo standard of review to the military's determination that Hamdi is an enemy combatant. Indeed, the court's August 16 Order states that the materials subject to its production order reflect only the "minimum" that the court would need to "evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification

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[13] The district court believed that respondents' attempt to obtain relief from its production order "impugn[ed] [its] loyalty to this country." Tr. of Aug. 20 Hrg. at 21; see ibid. ("what you're indicating is I would turn this over to some terrorist group. And that is insulting, believe me.") (J.A. 460). Respondents in no way question the loyalty of the district court. But that does not mean that respondents should be required to produce, inter alia, classified documents, including potential intelligence in connection with an ongoing war, that is not necessary to dispose of the habeas petition. Indeed, access to such classified materials is highly restricted on a "need to know" basis within the Executive itself. Cf. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.) ("It is not to slight judges, lawyers or anyone else to suggest that any [disclosure of classified information] carries with it serious risk that highly sensitive information may be compromised.'), cert. denied, 421 U.S. 908 (1975).

as an enemy combatant is justified." Aug. 16 Order at 9, 14 (emphasis added). The court specifically indicated that it might go even further and order Hamdi himself produced for an evidentiary hearing to inquire into the various statements he made to military interrogators, and thus threaten the vital national security interests in intelligence-gathering. See Aug. 16 Order at 13 ("While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification."). And the court's astonishing demand for the names and addresses of military personnel who have interviewed Hamdi would require the military to expend finite resources to track down the location of soldiers in the field in an active conflict and suggests that the district court may even regard them as potential witnesses.

The production order grossly departs from the constitutional principles recognized by this Court's prior decision and discussed above. In particular, the Court stated that "[a]ny standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation." Hamdi, 296 F.3d at 283-284. The order also disregards this Court's admonition that "allowing alleged combatants to call American commanders into account in federal courtrooms would stand the warmaking powers of Article I and II

on the heads." Id. at 284. Indeed, the district court's production demands come not at petitioners' urging, but sua sponte. This Court should make clear that the production order oversteps any constitutionally appropriate judicial role.

Finally, the production order suffers serious flaws wholly apart from the fact that it reflects an improper conception of the judicial role in this sensitive context. Even if this Court were to conclude that, notwithstanding the considerations discussed in Part I above, respondents should be required to provide some further materials to support the military's determination that Hamdi is an enemy combatant, the Court should still set aside the district court's production order in its entirety. Instead of subjecting the military to the unprecedented demands placed upon it by the district court's order, the Court should further delineate the showing that the government would be required to make, and remand with instructions that respondents should be afforded an opportunity to meet that showing without being subjected to any particular production demands by the court.[14]

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[14] Although the production order is an intrusion and inappropriate in the aspects discussed above, respondents have already provided or offered to provide much of the material demanded by the court. First, as discussed above, respondents offered to provide the district court with additional information concerning the screening criteria. Second, the Mobbs Declaration establishes a chronology of the Hamdi's detention. Third, the Mobbs Declaration explains that military personnel in Afghanistan, acting under the authority of the Commander, U.S. Central Command, made the determination that Hamdi is an enemy combatant and should be detained as such. The district court's failure to recognize what respondents had already

III. THIS COURT SHOULD REVERSE AND REMAND WITH INSTRUCTIONS TO DISMISS THE PETITION

By holding that respondents' return and supporting declaration are insufficient and ordering the production of the additional materials, the district court's August 16 Order necessarily rejected respondent's motion to dismiss. This Court should reverse that erroneous order and remand with instructions to dismiss the petition. Because the government has adequately shown that Hamdi is "indeed an 'enemy combatant' who was captured during hostilities in Afghanistan," Hamdi, 296 F.3d at 283, no further district court proceedings are necessary to dispose of the petition. Furthermore, as the proceedings on remand from the prior appeal underscore, sending the case back to the district court for additional proceedings in all likelihood would invite the need for further appellate supervision of this action.

None of the purely legal arguments raised below by petitioners or the district court below in resisting dismissal precludes this Court from ordering dismissal at this time. Petitioners below contended that Hamdi's detention is illegal because "the armed conflict with the Taliban has ended." Traverse at 15 n.7; see id. at 6. But that argument is utterly without merit. While the Taliban regime has been removed from power, the hostilities in Afghanistan are ongoing. Indeed, thousands of United States

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provided or offered to provide underscores how far its review of the government's return and declaration went awry.

and coalition forces remain in Afghanistan and engage in daily combat operations, particularly in eastern Afghanistan where many remaining al Qaeda and Taliban have fled. See, e.g., M. Kelley, New Mission Launched in Afghanistan, Associated Press, Oct. 2, 2002 (www.story.news.yahoo.com/news? tmpl=story&u=/ap/20021002/ap_on_re_us/afghan_us_military_4) ("In the largest ground operation in Afghanistan in six months, up to 2,000 U.S. Army troops are searching the mountains of southeastern Afghanistan for Taliban and al-Qaida holdouts."); M. Rosenberg, Shots Fired at U.S. Special Operations Forces in Southeastern Afghanistan, Associated Press, Oct. 1, 2002, (www.story.news.yahoo.com/news?tmpl=story&u=/ap/20021001/ap_wo_en_po/afghan_us_shooting_3); J. Garamone, U.S. Personnel Comes Under Fire In Afghanistan, American Forces Press Service, Sept. 20, 2002 (www.af.mil /news/efreedom). Moreover, the conflict in Afghanistan is part of a broader military campaign that, as the Commander in Chief has emphasized, is far from complete.[15]

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[15] See, e.g., Remarks to the Nation, Office of the Press Secretary, Sept. 11, 2002 ("America has entered a great struggle that tests our strength, and even more our resolve.") (www.whitehouse.gov/news/releases/2002/09/print/20020911-3.html); President Salutes Troops of the 10th Mountain Division, Office of the Press Secretary, July 19, 2002 (www.whitehouse.gov/news/releases/2002/07/20020719.html) ("In Afghanistan, coalition troops still have critical work. And the dangers haven't passed. Elsewhere, new threats are taking shape."). The Supreme Court has expressly recognized that questions concerning the cessation of hostilities or the scope of armed conflict are committed to the political branches. See, e.g., Ludecke v. Watkins, 335 U.S. at 170.

Petitioners have asserted that 18 U.S.C. 4001(a) bars Hamdi's detention as an enemy combatant.[16] Although the petition itself makes no mention of Section 4001(a), petitioners raised it before this Court and relied on it at oral argument in the prior appeal. This Court specifically inquired about Section 4001(a)'s application to this case during the argument, see Tr. of June 25, 2002 Arg. at 18-19, and nonetheless correctly concluded that Hamdi's "present detention" is "lawful" as long as he is indeed an enemy combatant. Hamdi, 296 F.3d at 283.

Nothing in Section 4001 suggests, much less clearly states, that Congress sought to intrude upon the "long * * * established" authority of the Executive to capture and detain enemy combatants in wartime. Hamdi, 296 F.3d at 283; see id. at

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[16] That provision – entitled "Limitation on detention; control of prisons" – states:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates, and provide for their * * * rehabilitation, and reformation.

18 U.S.C. 4001.

281-282 ("The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."). To the contrary, Congress placed Section 4001 in Title 18 of the United States Code – which governs "Crimes and Criminal Procedure" – and addressed it to the control of civilian prisons and related detentions. Subsection (b) addresses "control and management of Federal penal and correctional institutions," and exempts from its coverage "military or naval institutions." 18 U.S.C. 4001(b). Subsection (a), the provision relied upon by petitioners, cannot be read without reference to the immediately surrounding text. See Owasso Indep. Sch. Dist. v. Falvo, 122 S. Ct. 934, 939-940 (2002). And, particularly when read as a whole, there is no basis for concluding that Section 4001 was in any way addressed to the military's detention of enemy combatants.

Moreover, even if Section 4001 were susceptible to a different interpretation, the longstanding canon of constitutional avoidance would independently foreclose any interpretation of Section 4001(a) that would extend it to interfere with the well-established authority of the President as Commander in Chief of the armed forces to detain enemy combatants during wartime. See Jones v. United States, 529 U.S. 848, 857 (2000); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Petitioners' proposed reading of Section 4001(a) would directly interfere with the President's ability to detain an enemy combatant

who claims citizenship. A Court should not infer that a provision that is explicitly addressed to civilian detentions was intended to override that long-established and vital wartime authority of the Executive.[17]

Finally, after respondents filed their return, petitioners for the first time asserted that Hamdi's detention violated joint service regulations (J.A. 91-128) setting forth the military's procedures for handling prisoners of war. See Traverse at 7-9 (citing Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997)). Specifically, petitioners contended that respondents have failed to convene a military tribunal to resolve any doubts about whether Hamdi is covered by the protections of the Third Geneva Convention applicable to prisoners of war, and have failed to house Hamdi in the

[17] In any event, the detention at issue is authorized by at least two different Acts of Congress. First, as this Court specifically noted, the challenged executive actions in this case fall within Congress's express statutory authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11 terrorist attacks." Hamdi, 296 F.3d at 283 (quoting 115 Stat. 224; emphasis added by court of appeals). Second, Congress has authorized the use of appropriated funds to the Department of Defense to pay for the expenses incurred in connection with "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4) (authorizing use of appropriated funding for "issue of authorized articles to prisoners and other persons in military custody"). By explicitly authorizing funding to the armed forces to pay for the detention of "prisoners of war" and persons – such as enemy combatants – "similar to prisoners of war" Congress has plainly authorized the military detention of such combatants.

kind of correctional facility required for prisoners of war under the regulations. Ibid.

The provisions of the regulations in question, however, apply only to persons who enjoy prisoner-of-war status under the Geneva Convention (and those for whom there is doubt as to whether they qualify as prisoners of war). See Reg. 1-5(a)(2) (providing that "[a]ll persons taken into custody by the U.S. forces will be provided the protections" afforded prisoners of war under the Geneva Convention "until some other status is determined by competent authority") (emphasis added); id. at 1-6(a) (stating that "if any doubt arises as to whether a [detainee qualifies for prisoner-of-war status] * * *, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."). The President, however, has conclusively determined that al Qaeda and Taliban detainees, such as Hamdi, do not qualify for such prisoner-of-war status. See p. 41, supra.[18]

* * * * *

This is the third appeal that this Court has heard in just five months involving the detainee in this case. The record is now complete and fully supports dismissal of

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[18] Even if Hamdi's detention were somehow inconsistent with the joint service regulations, that would not entitle Hamdi to relief in this habeas action, much less his release. That is particularly true, moreover, given that those regulations, if applicable, would primarily relate to the conditions of Hamdi's confinement, and petitioners have made clear that "Petitioner Hamdi is not contesting the conditions of his confinement." Pet. Traverse at 9; cf. Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

the petition outright, and any remaining legal challenges to Hamdi's detention are fully capable of resolution by this Court in the present appeal. The extraordinary actions taken by the district court to date also support entry of such relief, as an alternative to the prospect of continuing appellate supervision of the district court proceedings. So too, the backdrop against which this action arises – an international conflict in which thousands of innocent Americans have been brutally killed at home and numerous American and allied soldiers have been killed or suffered casualties in the field – counsels in favor of disposing of this action as swiftly as possible, and eliminating any doubt about the military's authority to detain the enemy combatant at issue. Accordingly, the Court not only should reverse the district court's August 16 Order, but remand with instructions that the petition be dismissed outright.

CONCLUSION

For the foregoing reasons, the district court's August 16 Order should be reversed and the case remanded with instructions to dismiss.

Respectfully submitted,

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OCTOBER 2002

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Respondents-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 13,903 words. This count was undertaken by the word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Respondents-Appellants was served, this 4th day of October, 2002, by facsimile and overnight delivery addressed to:

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